

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE SECRETARY OF STATE

In the Matter of the Proposed Exempt
Permanent Rules Governing the Safe at
Home Program, Minnesota Rules,
Chapter 8290

ORDER ON REVIEW OF RULES
UNDER MINN. STAT. § 14.388

On September 28, 2007, the Office of the Secretary of State filed documents with the Office of Administrative Hearings seeking review and approval of the above-entitled rules under Minn. Stat. § 14.388, subd. 1.

Based upon a review of the written submissions by the agency and the public comments in this matter, and for the reasons set out in the Memorandum which follows,

IT IS HEREBY ORDERED:

The proposed rules are disapproved.

Dated: October 12, 2007

/s/ Eric L. Lipman

ERIC L. LIPMAN
Administrative Law Judge

NOTICE

Minn. Rule pt. 1400.2400, subp. 4a provides that when a rule is disapproved the agency must resubmit the rule to the administrative law judge for review after changing it. The judge then has five working days to review and approve or disapprove the rule. Minn. Rule pt. 1400.2400, subp. 5 provides that an agency may ask the Chief Administrative Law Judge to review a rule that has been disapproved by a judge. The request must be made within five working days of receiving the judge's decision. The Chief Judge must then review the agency's filing within 14 days of receiving it.

MEMORANDUM

Authorization to Undertake Rulemaking

In 2006, the Minnesota Legislature enacted Minnesota Statutes Chapter 5B, establishing the “Safe at Home” program on Data Protection for Victims of Violence.¹ Under the program, participants may “use an address designated by the secretary of state as a substitute mailing address for all purposes,” and later the “Office of the Secretary of State shall forward all mail sent to the designated address to the proper program participants.”² Through the use of this secure mail forwarding service, “individuals attempting to escape from actual or threatened domestic violence, sexual assault, or stalking” could receive mail and remain in contact with various officials, without making their address available to abusers.³

In Minn. Stat. § 5B.08, the Legislature declares:

Enactment of this section satisfies the requirements of section 14.388, subdivision 1 for the enactment of rules to facilitate the administration of this chapter by state and local agencies.⁴

The agency states in its Order Adopting Rules that under this section, the proposed changes “may be adopted pursuant to section 14.388.”

Minn. Stat. § 14.388, subd. 2 provides that interested parties have five business days after the date of the Notice of Adoption to submit comments to the Office of Administrative Hearings. The comment period ended on October 5, 2007. OAH received four timely comments concerning this rule.

Use of the Good Cause Exemption

Minn. Stat. § 14.388 provides that an abbreviated and streamlined set of procedures for promulgating new rules may be used when “good cause” is present. In this instance, the Legislature has determined that good cause is present through its declaration that “[e]nactment of this section satisfies the requirements of section 14.388, subdivision 1.”⁵

In this process, the legality determination is governed by Minn. Rule pt. 1400.2400, subp. 3. This procedure states that in reviewing a filing, the Administrative Law Judge must decide whether the proposed rule meets the standards of part 1400.2100, Items A and D to G. Those standards of review provide as follows:

¹ See, 2006 Laws of Minnesota, Chapter 242, Sections 1 through 8.

² See, Minn. Stat. §§ 5B.01 and 5B.05 (c) (2006).

³ See, Minn. Stat. § 5B.01 (2006).

⁴ See, Minn. Stat. § 5B.08 (2006).

⁵ *Id.*

A rule must be disapproved by the judge or chief judge if the rule:

A. was not adopted in compliance with procedural requirements of this chapter, Minnesota Statutes, chapter 14, or other law or rule, unless the judge decides that the error must be disregarded under Minnesota Statutes, section 14.15, subdivision 5, or 14.26, subdivision 3, paragraph (d);

. . .

D. exceeds, conflicts with, does not comply with, or grants the agency discretion beyond what is allowed by its enabling statute or other applicable law;

E. is unconstitutional or illegal;

F. improperly delegates the agency's powers to another agency, person or group;

G. is not a "rule" as defined in Minnesota Statutes, section 14.02, subdivision 4, or by its own terms cannot have the force and effect of law. . . .

The Significance of the Claimed Good Cause Exemption

A key difficulty in this case is that the Legislature did not specify in section 5B.08 which of the four possible good cause exemptions is applicable to the administrative rules for this program. There are four distinct choices under section 14.388, subdivision 1. The agency may dispatch with the ordinary requirements for rulemaking so as to:

- (1) address a serious and immediate threat to the public health, safety, or welfare;
- (2) comply with a court order or a requirement in federal law in a manner that does not allow for compliance with sections 14.14 to 14.28;
- (3) incorporate specific changes set forth in applicable statutes when no interpretation of law is required; or
- (4) make changes that do not alter the sense, meaning, or effect of a rule.⁶

The lack of a particular designation is significant because, as section 14.388 makes clear, rules that are "adopted, amended, or repealed under [subdivision 1] clauses (1) and (2) are effective for a period of two years from the date of publication of

⁶ See, Minn. Stat. § 14.388 (1) (2006).

the rule in the State Register.”⁷ By contrast, rules that are promulgated under subdivision 1, clauses (3) or (4) may stand as permanent rules.⁸

Second, and likewise important, the grant of substantive rulemaking power under section 14.388 follows these distinctions: So as to permit agencies to address either immediate threats or to comply with lawful directives, the agency has broader powers to choose among competing policy alternatives when it is promulgating temporary rules (under clauses (1) or (2)), than when it is promulgating permanent rules.

Under the second two clauses, however, the agency’s power to select among differing policy alternatives, and to make these selections permanent, is sharply reduced. This is because clauses (3) or (4) contemplate that administrative rules will only be promulgated through these exemptions when the substantive policy choices underlying the new rules were made through an earlier, publicly-accessible process (such as a prior rulemaking or through the Legislature’s enactment of a statute which sets forth the specific requirements).⁹

Analysis of the Agency’s Submissions

Because the legal standards differ among the four “good cause” exemptions in section 14.388, subdivision 1, the question recurs: Which exemption did the Minnesota Legislature intend to apply to these rules?

The agency’s writings on this point are in conflict. While the ordinary reader might, at first blush, assume that the Secretary of State would invoke section 14.388, subdivision 1, clause (1) for the Safe at Home program – on the grounds that the rules “address a serious and immediate threat to the public health, safety, or welfare” – the Secretary’s Order Adopting Rules and the Adopted Rules referenced in the Order state that “Permanent Rules” are intended.¹⁰ The public safety exemption of section 14.388, subdivision 1, clause (1), applies only to temporary but not to permanent rules. Accordingly, the natural assumption an ordinary reader might make is disclaimed by the text of the Secretary’s Order.

Further complicating this analysis, by way of a writing submitted on October 12, 2007, the Office of the Secretary of State notes that notwithstanding the earlier Order’s use of the terms “permanent rules,” “[t]he understanding of this office has been that these rules will be effective for a period of two years from the date of publication of the rule in the State Register.” Continues Secretary Ritchie:

As you can see, section 5B.08 does not specify under which clause of section 14.388 the rulemaking authority is granted. However, based upon the nature of

⁷ *Id.*

⁸ *Id.*

⁹ See, Minn. Stat. § 14.388, subd. (1)(3) and (1)(4) (2006).

¹⁰ Compare, *Order Adopting Rules*, at 1 (Sept. 28, 2007) with Minn. Stat. § 14.388 (1) (2006).

the Proposed Rules, the subject matter of these rules, and the nature of the clauses in section 14.388, it has been the understanding of this office that clauses (2), (3) and (4) do not apply, and that the authority is best understood as granted under section 14.388, subdivision 1, clause (1).¹¹

Regrettably, however, this later submission cannot be given effect. The Administrative Law Judge doubts that an agency head's Order Adopting Rules may be countermanded or revised by way of a later letter.¹² Likewise problematic, a set of "Permanent Rules" were noticed in the State Register and circulated to the public – a fact that forecloses an amendment to the agency's submissions after the close of the comment period.¹³

Because permanent rules were adopted by the Secretary, the Administrative Law Judge has no alternative but to apply the standards associated with section 14.388, subdivision 1, clause (3) in the legality determination.¹⁴ This is so because subdivision 1, clause (4) could not possibly apply – as the adopted rules are new additions and do not revise any earlier text¹⁵ – and no other exemption for permanent rules exists.

Even under the most generous reading of the rules possible, the procedures adopted by the Secretary of State for the Safe at Home program do more than merely "incorporate specific changes set forth in applicable statutes when no interpretation of law is required" While a catalogue of many examples could be listed here, because the entire rule is disapproved, it suffices to say that the proposed procedures relating to: (a) accreditation of application assistants,¹⁶ (b) the circumstances under which an actual address will be used,¹⁷ and (3) the reporting summary data on motor vehicles owned by program participants,¹⁸ are not drawn directly from the statutory text.

Sensible policy choices though they may be, the authorization for rulemaking under subdivision 1, clause (3) contemplates a very direct nexus between the language used by the Legislature in the authorizing statute and the agency's response in issuing rules to those legislatively-established specifications. Here, the procedures developed for the Safe at Home program with stakeholders after the legislation was enacted, do not follow directly from the statutory text. They are too large and different to be approved through the comparatively narrow pathway of subdivision 1, clause (3).

¹¹ Letter of the Hon. Mark Ritchie, at 2 (Oct. 12, 2007).

¹² *Compare*, Minn. Stat. §§ 14.37 (1), 14.386 (a)(2) and 14.388 (1) (2006).

¹³ *Compare*, Minn. Stat. § 14.388 (2) (2006) with 32 State Register 462 (Sept. 10, 2007).

¹⁴ *Id.*

¹⁵ *Compare*, Minn. Stat. § 14.388 (1)(4) (2006).

¹⁶ *See*, Proposed Rule 8290.0900.

¹⁷ *See*, Proposed Rule 8290.1100, subp. 4.

¹⁸ *See*, Proposed Rule 8290.1200.

***Obiter Dicta* on the Secretary's Definition of the Term "Mail"**

While the Secretary of State may choose to later resubmit the Safe at Home program rules, as temporary rules, under subdivision 1, clause (1), the Administrative Law Judge makes one further observation that is not directly related to the questions presented in this proceeding. During any follow-on rulemaking process, the Secretary is urged to consider whether the (otherwise perfectly sensible) choice to limit the mail forwarding program authorized by Chapter 5B to first class mail, boxes of blank checks and prescription medicine¹⁹ is at odds with the underlying statutes. The Secretary will recall that the Legislature established this program so as to "enable program participants to use an address designated by the secretary of state as a substitute mailing address for *all* purposes," and to this end directed the Office of the Secretary of State to "forward *all* mail sent to the designated address to the proper program participants."²⁰ The Legislature's serial use of the word "all" suggests a broader range of activities (and non-first class mail items that will be forwarded to program participants) than is currently described in the proposed rules.

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¹⁹ See, Proposed Rule 8290.0100, subp. 12.

²⁰ See, Minn. Stat. §§ 5B.01 and 5B.05 (c) (2006) (emphasis added).